

# 17-2250

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## UNITED STATES COURT OF APPEALS

*for the*

## SECOND CIRCUIT

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National Labor Relations Board,

Petitioner.

v.

Deep Distributors of Greater N.Y., Inc.  
d/b/a The Imperial Sales Inc.,

Respondent.

APPLICATION FOR ENFORCEMENT OF THE JUNE 20, 2017 DECISION AND  
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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### RESPONDENT'S FINAL FORM BRIEF

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SAUL D. ZABELL, ESQ.  
ATTORNEY FOR RESPONDENT  
1 CORPORATE DRIVE, SUITE 103  
BOHEMIA, NY 11716  
(631) 589-7242  
SZABELL@LABORLAWSNY.COM

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## **I. JURISDICTIONAL STATEMENT**

Petitioner, the National Labor Relations Board, (“Petitioner”) seeks enforcement of their Decision and Order in the matter of Deep Distributors of Greater NY *d/b/a The Imperial Sales, Inc. and United Workers of America, Local 660 and Henry Hernandez, Cases 29-CA-147909, 29-CA-157108, and 29-RC146077*. Respondent, Deep Distributors of Greater N.Y., Inc. *d/b/a The Imperial Sales, Inc.* (“Respondent”) does not contest or otherwise dispute the basis for the National Labor Relations Board’s jurisdiction or that of the Court of Appeals.

## **II. STATEMENT OF ISSUES**

Petitioner argues this Court should:

1. Enforce the National Labor Relations Board’s June 20, 2017 Order issued against Deep Distributors of Greater N.Y., Inc. *d/b/a The Imperial Sales, Inc.* Specifically, Petitioner seeks to enforce that Respondent comply with the following:
  - a. Reinstatement of the eight employees;
  - b. Rescind the July 21, 2015 Work Rules;
  - c. Post and read aloud the “Notice to Employees”;
  - d. Publish the “Notice to Employees” in three publications of general local interest and circulation; and



- e. Furnish the Union, upon request, with lists of the names, addresses, and classifications of employees.
2. Whether Respondent has already substantially complied with the National Labor Relations Board's Order of June 20, 2017.
3. Whether the NLRB has waived its right to certain relief by their own omissions and failures.
4. Whether the National Labor Relations Board's Order may be enforced against Respondent to the extent that it requires reinstatement and back-pay to be provided to undocumented aliens whom are not authorized to work in the United States.

### **III. STATEMENT OF THE CASE**

Petitioner seeks enforcement of the NLRB's Order of June 20, 2017. However, Respondent has already taken all reasonable steps necessary for compliance with the Order. There are two principal components of Petitioner's Order against Respondent. The first being that Respondent must cease and desist from engaging in certain activity. The second, requiring Respondent to take specific, affirmative action necessary to effectuate the policies of the National Labor Relations Act. However, Respondent has taken all steps necessary to comply with the legally enforceable obligations contained in the NLRB's Order. Petitioner's

application seeks to enforce compliance with five (5) sections of the July 20, 2017 Order. However, Respondent will address its compliance with the entire Order.

#### **IV. STATEMENT OF FACTS RELEVANT TO THE APPEAL**

##### **Procedural Background of the NLRB Action**

On March 10, 2015, the Union filed an Unfair Labor Practice charge on behalf of Jose Argueta, Jose Martin Torres, Jose Michel Torres, alleging they were terminated from their employment because of their support for, and activities undertaken on behalf of, the Union. The Union filed amended charges on March 12 and August 31, 2015. On July 31, 2015, Henry Hernandez filed a charge alleging that he and fellow employees Javier Reyes, Marvin Hernandez, Jose Roberto Reyes, and Augustin Sabillon were terminated because of their protected activities related to filing a FLSA lawsuit.

The various charges were consolidated by the Board's Regional Director Kathy Drew-King ("Drew-King") into an Amended Consolidated Complaint, and hearings were held on December 9, 11, 21, 22, and 23, 2015 and January 20, 22, 26, and 27, 2016 all before ALJ Steven Davis. During the proceedings, Petitioner's General Counsel moved to add additional allegations on December 9, 2015, on December 11, 2015, and on December 22, 2015. ALJ Davis granted all three motions to amend.



## **The FLSA Action against Respondents**

On July 8, 2015, several of Respondents' employees, Jose Reyes, Jairo Bonilla, Augustin Sabillon, Javier Reyes, Selvin Vasquez, Marvin Hernandez, Henry Hernandez, Jose Olan Amador, Armando Lazo, Valerio Baquedano, Jose Michel Torres, Jose Argueta, and Noel Efrain Castro filed a Complaint in the United States District Court for the Eastern District of New York alleging that Respondent, by and through the actions of Tony Bindra, Danny Bindra, and Herb Miller violated certain provisions of the Fair Labor Standards Act and New York Labor Law. (*See* DE 22: General Counsel's Exhibit "7"; [DA 136-148]). The case is captioned as *Reyes, et al. v. The Imperial Sales, Inc., et al.*, 15-cv-3980 (JMA) (ARL). Notably, Henry Hernandez, Augustin Sabillon, Jose Roberto Reyes, Jose Michel Torres, Jose Argueta, and Javier Reyes were Plaintiffs in the FLSA action.

On March 30, 2017, the parties to the FLSA action resolved the litigation before Judge Joan M. Azrack. (Exhibit "F").<sup>1</sup> Specifically, the case was settled with respect to the claims of Plaintiffs Jose Reyes, Augustin Sabillon, Selvin Vasquez, Henry Hernandez, Jose Olan Amador, Armando Lazo, Valerio Baquedano, and Jose Argueta. Judge Joan M. Azrack dismissed the claims of Jairo Bonilla, Javier Reyes, Jose Michel Torres, Noel Efrain Castro, and Marvin Hernandez. (Exhibit "F").

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<sup>1</sup> On November 3, 2017, Respondent filed a Motion to Supplement the Record. All citations to documents to which Respondent seeks to introduce will be made in reference to their Exhibit letter, and where necessary, page number.

At the March 30, 2017 conference, Judge Azrack expressly advised the Plaintiffs that by entering into the agreement, they were also giving up their rights to any recovery or relief under their case before the NLRB. (Exhibit “F”, at p. 13-14). Specifically, the transcript of the proceedings reads:

The Court:	Does everybody understand this settlement? Ends this case for all time. Ends it....
Mr. Zabell:	Your Honor, may I ask if you can question them if they understand that they're waiving their right as part of this settlement to any recovery from the National Labor Relations Board?
The Court:	Yeah, I was going to get to that next. When I say it ends the case for all time, it ends this case and any case you would have with the National Relations Board. You're giving that up too...
The Court:	Agreed?...
Mr. El-Hag:	Jose Roberto Reyes.
Mr. Reyes:	Yes.
Mr. El-Hag:	Jose Argueta.
Mr. Argueta:	Yes.
Mr. El-Hag:	Augustin Sabillon.
Mr. Sabillon:	Yes.
Mr. El-Hag:	Henry Hernandez.
Mr. Hernandez:	Yes.

Additionally, the parties entered into a formal settlement agreement, which was signed and executed by Javier Reyes, Augustin Sabillon, Henry Hernandez, and Jose Argueta on June 2, 2017. (Exhibit “E”). In the written agreement, the Plaintiffs agreed that “all monies paid hereunder shall be set off against and satisfy any relief or recovery... from the action bearing Case Numbers: 29-CA-147909 & 157108 & 146077.” (Exhibit “E”, at p. 8). Javier Reyes, Augustin Sabillon, Henry Hernandez,

and Jose Argueta waived their rights to any relief or recovery, including equitable relief, by entering into the settlement agreement in the FLSA action.

### **The Decisions and Orders of Administrative Law Judge Davis**

On May 6, 2016, ALJ Davis issued a Decision and Order. (*See* DE 22: Administrative Law Judge's Decision; [DA 174-218]). On May 25, 2016, the ALJ issued an Order modifying the Remedy, Order, and Notice provisions of the May 6, 2016 decision. (*See* DE 22: Administrative Law Judge's Order Modifying Order in Previous Decision; [DA 219-227]). By and through his May 25, 2016 Amended Order, ALJ Davis recommended several remedies, ordering that Respondent take specific, affirmative actions and to cease and desist from engaging in certain conduct. On June 22, 2016, pursuant to Section 102.46 of the NLRB's Rules and Regulations, Respondent filed fifty-one (51) exceptions to the May 25, 2016 Order. (*See* DE 22: Respondent's Exceptions; [DA 228-238]). Accordingly, the Decision and Order of May 25, 2016 was non-binding.

### **Regional Director Drew-King's Motion for a Preliminary Injunction**

On April 19, 2016, Regional Director Drew-King filed a Motion for a Preliminary Injunction pursuant to Section 10(j) of the National Labor Relations Act with the United States District Court for the Eastern District of New York. (Exhibit "A"). The matter was assigned to United States District Court Judge Sandra J. Feuerstein and United States Magistrate Judge A. Kathleen Tomlinson bearing the



caption *Drew-King, et al. v. Deep Distributors of Greater NY, Inc.*, 16-cv-1916 (SJF) (AKT). On July 5, 2016, Judge Feuerstein entered an Order granting Drew-King's Motion for a Preliminary Injunction. (Exhibit "B").

As a part of the Order of July 5, 2016, Judge Feuerstein required Respondent write to Henry Hernandez, Augustin Sabillon, Jose Michel Torres, Jose Roberto Reyes, and Javier Reyes and offer full reinstatement of their job position within seven (7) days of the date of the Order. On July 11, 2016, Respondent offered reinstatement to each individual, scheduled to commence July 15, 2016. (Exhibit "C"). The offer was conveyed care and order of Jordan El-Hag, Esq., whom was representing the five individuals in a wage and hour action. No individual offered reinstatement appeared to commence employment on July 15, 2016.

On July 26, 2016, a Court Conference was convened before Judge Feuerstein. At that conference, the Judge did not find Respondent failed to offer unconditional reinstatement. Following the conference, on July 29, 2016, Respondent made a second unconditional offer of reinstatement to Henry Hernandez, Augustin Sabillon, Jose Michel Torres, Jose Roberto Reyes, and Javier Reyes in a letter addressed directly to each individual. (Exhibit "D"). Tellingly, no objection was raised by Drew-King regarding the manner by which the July 29, 2017 offer was extended.

On August 19, 2016, only two (2) individuals appeared at Respondent's place of business; Augustin Sabillon and Jose Roberto Reyes. The individuals were

provided with an "Employee Information" form and NY State Wage Theft Prevention Act materials; i.e., New York Labor Law LS 52 and 54 documents pursuant to Section 195.1 of the New York Labor Law. The documentation provided sought to confirm rates of pay, the employee's name, address, telephone number, emergency contact information and reminded the employees that it was their responsibility to update the form. The employees were instructed to consult with whomever they wished, and to return the documents, but failed to do so. Henry Hernandez, Jose Michael Torres, and Javier Reyes did not accept Respondent's July 11, 2016 or July 29, 2016 offers of reinstatement.

#### **The June 20, 2017 Decision and Order of the NLRB**

On June 20, 2017, the NLRB entered a Decision and Order that Respondent violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. The NLRB Ordered Respondent must cease and desist from engaging in certain activity. Additionally, the Order required that Respondent take certain affirmative steps necessary to effectuate the policies of the National Labor Relations Act. Specifically, the Order required Respondent take the following affirmative action:

- a) Within 14 days from the date of this Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Jose Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed;



- b) Make whole Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Jose Roberto Reyes, Javier Reyes, and Augustin Sabillon for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the judge's remedy as modified herein, plus reasonable search-for-work and interim employment expenses.
- c) Compensate Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Jose Roberto Reyes, Javier Reyes, and Augustin Sabillon for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amounts of backpay are fixed, either by agreement or Board order, reports allocating the backpay awards to the appropriate calendar year(s) for each employee.
- d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Jose Roberto Reyes, Javier Reyes, and Augustin Sabillon, and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.
- e) Rescind the "Employee Code of Conduct" that was implemented on July 21, 2015, and notify the employees that it has done so.
- f) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance of employees, at which the attached "Notice to Employees" shall be read to employees by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or at the Respondent's option by a Board agent in the presence of a responsible management official and, if the Union so desires, an agent of the Union.
- g) Within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondent's general manager Tony Bindra or his successor, and do so at its expenses. Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined



by the Regional Director for Region 29 and need not be limited to newspapers so long as they will achieve broad coverage of the area.

- h) Upon request of the Union, immediately furnish it with lists of the names, addresses and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.
- i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- j) Within 14 days after service by the Region, post at its facility in Bethpage, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expenses, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2015; and
- k) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

On June 27, 2017, a mere seven (7) days from the date of the Order of the NLRB, Petitioner wrote to Respondent's counsel and advised of their intent to proceed with enforcement of the Order. In the correspondence, Petitioner alleges Respondent somehow failed to comply with the Board's Order. Petitioner's correspondence is silent as to the specific basis for their position. Moreover, Petitioner's correspondence was written prior to the expiration of the fourteen (14) day period by which Respondent was required to demonstrate partial compliance with the Order.

### **The Immigration Status of the Aggrieved Individuals**

Under the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275 (2002) and its progeny, the NLRB may not enforce an order of backpay for individuals who are not authorized to work in the United States. Each individual herein is not authorized to work in the United States.

Respondent's counsel attempted to raise the issue of the immigration status during the underlying action before ALJ Davis. However, ALJ Davis specifically directed that "[w]e're not getting into questions of social security or authorization to work in the United States. It's irrelevant to this case." (See DE 22: Transcript of Hearing on 12-9-15, p. 130; [DA 51]). Respondent objected to ALJ Davis's ruling, but was not permitted to proceed. Nonetheless, ALJ Davis issued an award of backpay and reinstatement, which was affirmed and adopted by the NLRB. (See DE

22: Administrative Law Judge's Decision; [DA 174-218]; Administrative Law Judge's Order Modifying Order in Previous Decision; [DA 219-227]; and June 20, 2017 Decision and Order; [DA 6-34]).

While ALJ Davis did not permit Respondent to question each individual on his respective immigration status during the course of the hearing, Petitioner's agent, Henry Powell, and Jordan El-Hag, counsel for the employees in the FLSA matter, confirmed that each individual is an undocumented alien not authorized to work in the United States. (Exhibit "M"). Mr. Powell made this representations to Respondent's counsel in his attempt to circumvent the Supreme Court's ruling in *Hoffman Plastic* and settle the NLRB action. When Respondent's counsel informed that no backpay could be awarded under the Supreme Court's decision in *Hoffman*, Mr. Powell provided numerous memoranda circulated by Petitioner all of which appear to be an elaborate scheme designed to violate the law according to *Hoffman Plastic*. (Exhibit "K" & "L"). Specifically, one memorandum required that a settlement payment be issued to the NLRB, who in turn would distribute the funds appropriately. (Exhibit "K"). Additionally, Mr. El-Hag advised Respondent's counsel of the immigration status of the so-affected individuals during the course of his representation in the FLSA.



## **Respondents' Compliance with the Affirmative Action Required by the June 20, 2017 Order**

Following the Order of the NLRB, Respondent took all reasonable remedial steps necessary to comply with its obligations. Several sections of the Order required Petitioner's participation. However, Petitioner refused to partake in any action necessary to ensure Respondent's compliance. Additionally, several sections of the NLRB's Order are unenforceable against Respondent under the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275 (2002). Specifically, Respondent is not legally required to comply with Sections 2(a), 2(b) and 2(c).

### **a) Respondent's Compliance with Section 2(a) of the Order**

Under Section 2(a) of the June 20, 2017 Order, Respondent was required to offer full reinstatement of their former jobs to Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon. While Section 2(a) may not be enforced by the NLRB, Respondent already offered to reinstate five of the employees in July, 2016. (Exhibit "J"). The offers of reinstatement came at the directive of United States District Court Judge Sandra J. Feuerstein. On July 5, 2017, Judge Feuerstein granted the Preliminary Injunction sought by Drew-King and further ordered that Respondent reinstate the five discharged employees regardless of their immigration status. (Exhibit "B").

Respondent first offered reinstatement to these individuals on July 12, 2016 in correspondence that was sent directly to their counsel, Jordan El-Hag. (Exhibit “C”). At that time, Mr. El-Hag represented the individuals in a civil action against the Respondent. Respondent felt it was most appropriate to offer reinstatement through Mr. El-Hag due to the ongoing litigation, as well as to prevent any confusion of the content of the letter, which was written in English, upon its receipt.

Notwithstanding the legitimate basis for Respondent’s delivery of the letters to Mr. El-Hag, Drew-King objected that the letters were not sent directly to the discharged employees. After Drew-King raised her objection Respondents made a second offer of reinstatement to the five discharged employees. On July 29, 2017, Respondent wrote directly to each of the five discharged employees and advised that their positions were available should they return to work on August 19, 2016. (Exhibit “D”). On August 19, 2016, only Augustin Sabillon and Jose Roberto Reyes appeared at Respondent’s place of business. However, Sabillon and Reyes failed to complete “Employee Information” form that was presented to them at the time of their reinstatement. Henry Hernandez, Javier Reyes, and Jose Michel Torres failed to respond to Respondent’s offer of reinstatement.

On September 26, 2016, Petitioner filed a motion seeking to hold Respondent in civil contempt for instituting unlawful conditions upon reinstatement. (Exhibit “N”). In their motion, Petitioner contended that Respondent provided Sabillon and

Reyes with i) an application for employment; 2) an immigration form; and 3) a third document containing company rules. With their motion, Petitioner only produced a generic application form, with no reference to Respondent. Respondent opposed the motion, and denied all allegations made by Petitioner. Respondent affirmed that it did not provide Sabillon or Reyes with, or utilize for any of its employees, the application. Additionally, Respondent affirmed that it did not require Sabillon and Reyes to undergo re-verification before returning to work. On August 15, 2017, Judge Feuerstein entered an Opinion and Order denying Petitioner's Motion. (Exhibit "N"). In her decision, Judge Feuerstein held that Petitioner failed to demonstrate its allegations or that Respondent failed to offer unconditional reinstatement to Sabillon and Reyes.

**b) Respondent's Compliance with Section 2(d) of the Order**

Under Section 2(d) of the June 20, 2017 Order, Respondent was required to remove from its files any reference to the unlawful discharge of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon. Respondent in point of fact, never maintained any reference of the aforementioned employees' discharge prior to the issuance of the June 20, 2017 Order. (Exhibit "J"). Since the personnel files of the discharged employees did not contain any reference of their termination, Respondent has complied with Section 2(d) of the Order.



**c) Respondent's Compliance with Section 2(e) of the Order**

Under Section 2(e) of the June 20, 2017 Order, Respondent was required to rescind the July 21, 2015 "Employee Code of Conduct" and notify employees that it had done so. On or about July 3, 2017, Respondent posted on its community bulletin board, a notice signed by its general manager, Tony Bindra, informing all employees that the July 21, 2015 "Employee Code of Conduct" had been rescinded. (Exhibit "J" & "G").

**d) Respondent's Compliance with Section 2(f) of the Order**

Under Section 2(f) of the June 20, 2017 Order, Respondent was required to hold a meeting, during business hours to ensure the "widest possible attendance of employees", at which time, a responsible management official is to read the "Notice to Employees" attached to the order. The requirement further states that a representative of Petitioner or a representative of the Union may attend should they desire to do so.

On June 29, 2017, counsel for Respondent wrote to Petitioner and the Union advising that Respondent intended to hold such a meeting on July 3, 2017 at 12:00 to conduct a public reading of the "Notice to Employees." The June 29, 2017 correspondence was sent *via* facsimile and priority mail, and was received by both Petitioner and the Union on June 30, 2017. (Exhibit "I"). On July 3, 2017, at approximately 12:00 p.m., Respondent held a meeting with all of its employees.

During the meeting, Respondent's General Manager, Tony Bindra, read aloud the "Notice to Employees." (Exhibit "J"). The meeting was filmed with a video camera. Neither the Petitioner, nor the Union sent a representative to witness the meeting.

**e) Respondent's Compliance with Section 2(g) of the Order**

Under Section 2(g) of the June 20, 2017 Order, within fourteen (14) days, Respondent was to publish a copy of the "Notice to Employees" in three publications of general local interest and circulation twice per week for a period of eight (8) weeks. Importantly, the specific publications were to be determined Drew-King.

On June 30, 2017, Respondent's counsel wrote to Drew-King and informed of her failure to provide a determination of the publications for which the "Notice to Employees" was to be published. (Exhibit "H"). Additionally, the letter stated that it would not be possible for Respondent to comply with Section 2(f) of the Order if such a determination was not provided. Further, the letter stated that if Respondent did not receive a directive from Drew-King by July 4, 2017, the deadline for compliance, this particular Section would be deemed waived for a failure to participate. The June 30, 2017 was sent *via* facsimile and priority mail on June 30, 2017. Drew-King did not respond to the correspondence. Moreover, to date, Drew-King has failed to furnish a list of publications in which Respondent was to circulate the "Notice to Employees."

**f) Respondent's Compliance with Section 2(h) of the Order**

Under Section 2(h) of the June 20, 2017 Order, upon request of the Union, Respondent was required to furnish a list of the names, addresses and classification of all of its employees as of the latest available payroll date. The Union never made such a request. (Exhibit "J").

**g) Respondent's Compliance with Section 2(i) of the Order**

Under Section 2(i) of the June 20, 2017 Order, Respondent was required to preserve all payroll records, social security payment records, timecards, personnel records, and all documents necessary to determine the amount of backpay due under the terms of the Order. Additionally, Respondent was required to produce such documentation to Drew-King within fourteen (14) days of a request for its production. Respondent continues to preserve all of the documentation required to by the Order. (Exhibit "J"). Drew-King has never made a request for such documentation. (Exhibit "J"). Moreover, Respondent is not legally required to provide backpay to the identified individuals.

**h) Respondent's Compliance with Section 2(j) of the Order**

Under Section 2(j) of the June 20, 2017 Order, within fourteen (14) days, Respondent was required to post a copy of the "Appendix" signed by Tony Bindra in conspicuous places and all locations where Respondent customarily post notices to employees in its Bethpage facility. The "Appendix" was to be posted for sixty



(60) consecutive days. Respondent posted a signed copy of the “Appendix” on the community bulletin board located at its Bethpage facility. (Exhibit “J” & “G”). The “Appendix” was posted for sixty (60) consecutive days. The “Appendix” was never altered, defaced, or covered by any other material. (Exhibit “J”).

**i) Respondent’s Compliance with Section 2(k) of the Order**

Under Section 2(k) of the June 20, 2017 Order, within twenty-one (21) days, Respondent was required to file with Drew-King a sworn certification of its compliance on a form provided by the Region. The Region never provided Respondent with a copy of a compliance form. Accordingly, Tony Bindra issued a sworn declaration of the steps taken by Petitioner in accordance with the June 20, 2017 Order. (Exhibit “J”). Bindra’s Affidavit was served upon Drew-King on July 10, 2017.

**V. SUMMARY OF ARGUMENT**

**A. Respondent has Already Taken Reasonable Steps Necessary to Satisfy its Compliance with the June 20, 2017 Order of the NLRB**

Notwithstanding Petitioner’s unsupported and conclusory allegation in their June 27, 2017 correspondence, Respondent has taken all action necessary to satisfy its obligations under the June 20, 2017 Order. The only aspects of the Order to which Respondent has not been fully compliant stem from Petitioner’s failure to participate where required to do so by the Order. Each section of the Order will be addressed individually to demonstrate both Respondent’s compliance and Petitioner’s failure

to participate in the remedial process. Additionally, Respondent will address the binding legal precedent that states that they are not required to comply with Sections 2(a), 2(b) and 2(c) of the Order.

**a) Respondent's Compliance with Section 1 of the Order**

Section 1 of the June 20, 2017 Order generally requires that Respondent cease and desist from engaging in certain activity. Respondent has fully complied with Section 1. There have been no claims asserted that Respondent has failed to refrain from engaging in the conduct prohibited by the June 20, 2017 Order.

**b) Respondents' Compliance with Section 2(a) of the Order**

Respondent satisfied its obligations under Section 2(a) of the Order because it twice offered reinstatement to Jose Michel Torres, Jose Roberto Reyes, Javier Reyes, Augustin Sabillon, and Henry Hernandez. (Exhibit "C" & "D"). Respondent's compliance came at the directive of United States District Court Judge Sandra J. Feuerstein. On July 5, 2017, Judge Feuerstein granted the Preliminary Injunction sought by Drew-King and further ordered that Respondent reinstate the five discharged employees. (Exhibit "B").

Respondent first offered reinstatement to these individuals on July 12, 2016 through correspondence that was sent directly to their counsel, Jordan El-Hag. (Exhibit "C"). At that time, Mr. El-Hag represented the individuals in a civil action pending against the Respondent. Again, Respondent, through counsel, felt it was

most appropriate to offer reinstatement through Mr. El-Hag due to the ongoing litigation as well as to prevent any confusion of the content of the letter, which was written in English, upon its receipt.

Notwithstanding the proper basis by which the offer of reinstatement was extended, Drew-King objected that the offer was not conveyed directly to each individual. After Drew-King raised her objection before District Court Judge Feuerstein, Respondents made a second offer of reinstatement to the five discharged employees. On July 29, 2017, Respondent wrote directly to each of the five discharged employees and informed each that their positions were available should they return to work on August 19, 2016. (Exhibit "D"). On August 19, 2016, two (2) individuals appeared at Respondent's place of business, Augustin Sabillon and Jose Roberto Reyes. However, Sabillon and Reyes failed to complete the "Employee Information" forms and Wage Theft Prevention Act materials presented to them at the time of their reinstatement. Henry Hernandez, Javier Reyes, and Jose Michel Torres failed to respond to Respondent's offer of reinstatement. While Petitioner challenged the reinstatement of Sabillon and Jose Roberto Reyes, on August 15, 2017, Judge Feuerstein entered an Order holding that it did not establish that Respondent failed to offer unconditional reinstatement. (Exhibit "N").

Additionally, pursuant to the settlement agreement and in consideration of the settlement of their claims, Augustin Sabillon, Jose Roberto Reyes, Jose Argueta, and



Henry Hernandez waived their rights to any relief or recovery under the NLRB action, including, but not limited to, reinstatement. This waiver was supervised, approved, and communicated directly to each individual by United States District Court Judge Joan M. Azrack during a conference on March 30, 2017. (Exhibit "F"). Moreover, each individual acknowledged their understanding of the rights that were waived. (Exhibit "F").

Accordingly, Respondent properly offered reinstatement to each discharged employee. The only two employees who appeared to work, Sabillon and Reyes, failed to return with a completed Wage Theft Prevention Act LS-52 forms and contact sheets necessary to begin working. Moreover, Sabillon and Reyes waived their right to reinstatement through the settlement agreement. Notwithstanding, the previous offers of reinstatement that were extended, the NLRB's Order requiring reinstatement is unenforceable under *Hoffman Plastic*.

**c) Respondent is not Legally Obligated to Comply with Sections 2(a), 2(b) and 2(c)**

Respondent is not legally required to provide backpay compensation, or to offer reinstatement to Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Jose Roberto Reyes, Javier Reyes, and Augustin Sabillon as directed in Sections 2(a) and 2(b) of the June 20, 2017 Order. Moreover, Respondent is not legally required to compensate these individuals for any adverse tax consequences resulting from a lump-sum backpay award as

directed in Section 2(c) of the Order. Under the controlling precedent on this issue, *Hoffman Plastic*, the NLRB is not permitted to award backpay to illegal aliens who are not authorized to work in the United States.

The *Hoffman* Court noted that the Immigration Reform and Control Act (“IRCA”), 8 U.S.C. §1324a, “makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility.” *Hoffman*, 535 U.S. at 141, 148 (the IRCA “mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. § 1324a(b). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1)”). The Supreme Court found that “allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.” *Hoffman*, 535 U.S. at 151.

This Court adopted the *Hoffman* Court’s determination, holding that “undocumented aliens were not entitled to backpay award”, even where employer had violated IRCA of 1986 by hiring and retaining them. *Palma v. N.L.R.B.*, 723 F.3d 176, 184-185 (2d Cir. 2013). Thus, the mere fact that an undocumented alien

was once retained by an employer does not permit the NLRB to issue an award of backpay or reinstatement.

Here, each so-affected individual is an undocumented alien whom his not authorized to work in the United States. While ALJ Davis prevented Respondent from questioning the individual employees regarding their authorization to work in the United States, there have been numerous representations confirming that each employee is an undocumented alien. (*See* DE 22: Transcript of Hearing on 12-9-15, p. 130; [DA 51]). The representations were made by both Henry Powell, the NLRB agent who represented the so-affected employees during the underlying hearing before ALJ Davis, and Jordan El-Hag, who represented the individuals in their FLSA action. (Exhibit “M”). Specifically, during his attempts to settle the NLRB actions, Mr. Powell conceded to Respondent’s counsel that each individual was not authorized to work in the United States. (Exhibit “M”). Mr. Powell proceeded by providing Respondent’s counsel with memoranda addressing the settlement of NLRB matters like here, where the employees are not authorized to work in the United States. (Exhibit “K” & “L”).

Considering this Court has ruled that backpay may not be awarded to an undocumented alien who was at one point retained by an employer, the instant Order may not be enforced just because the so-affected individuals once were retained by Respondent. Accordingly, the portion of the Order directing Respondent to issue



backpay is invalid under the Supreme Court's decision in *Hoffman* and this Court's decision in *Palma*. Similarly, Section 2(a) may not be enforced against Respondent, as requiring reinstatement of individuals not authorized to work in the United States is akin to requiring that Respondent violate IRCA.

Additionally, as previously discussed, Augustin Sabillon, Jose Roberto Reyes, Jose Argueta, and Henry Hernandez each waived their rights to any relief or recovery under the NLRB action, including, but not limited to, reinstatement and/or monetary relief. (Exhibit "E" & "F"). Therefore, Respondent is not required comply with Sections 2(a), 2(b) and 2(c) of the Order. In the alternative, this matter must be remanded so that Respondent may question each witness regarding their authorization to work in the United States.

**d) Respondents' Compliance with Section 2(d) of the Order**

Under Section 2(d) of the June 20, 2017 Order, Respondent was required to remove from its files any reference to the unlawful discharges of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon. Respondent never maintained records of the aforementioned employees' discharge prior to the issuance of the June 20, 2017 Order. (Exhibit "J"). Since the personnel files of the discharged employees contain no reference to their termination, Respondent was already compliant with Section 2(d) of the Order.

**e) Respondent's Compliance with Section 2(e) of the Order**

Under Section 2(e) of the June 20, 2017 Order, Respondent was required to rescind the July 21, 2015 "Employee Code of Conduct" and notify employees that it had done so. On or about July 3, 2017, Respondent posted on its community bulletin board, a notice signed by its general manager, Tony Bindra, informing all employees that the July 21, 2015 "Employee Code of Conduct" had been rescinded. (Exhibit "J" & "G"). Thus, Respondent has complied with Section 2(e) of the Order.

**f) Respondent's Compliance with Section 2(f) of the Order**

Respondent complied with Section 2(f) of the June 20, 2017 Order when on July 3, 2017 at 12:00 p.m. a meeting of all current employees was held, during which time Respondent's General Manager, Tony Bindra, read aloud the "Notice to Employees" issued by the NLRB in conjunction with the June 20, 2017 Order. On June 29, 2017, counsel for Respondent informed both Petitioner and the Union of the meeting scheduled for July 3, 2017. (Exhibit "I"). Nonetheless, Petitioner and the Union did not attend the July 3, 2017 reading. (Exhibit "J"). Respondent filmed the meeting to demonstrate compliance. (Exhibit "J"). Accordingly, Respondent satisfied its obligations under Section 2(f).

**g) Respondent's Compliance with Section 2(g) of the Order**

Respondent has taken all reasonable steps necessary in their efforts to comply with Section 2(g) of the June 20, 2017 Order. On June 30, 2017, Respondent's

counsel wrote to Drew-King and informed of her failure to provide a determination of the publications for which the “Notice to Employees” was to be published. (Exhibit “H”). Additionally, the letter stated that it would not be possible for Respondent to comply with Section 2(f) of the Order if such a determination was not provided. Further, the letter stated that if Respondent did not receive a directive from Drew-King by July 4, 2017, the deadline for compliance, this particular Section would be deemed waived for a failure to participate. (Exhibit “H”). The June 30, 2017 was sent *via* facsimile and priority mail on June 30, 2017. Drew-King failed to respond to the correspondence. Moreover, to date, Drew-King has failed to furnish a list of publications for Respondent to circulate the “Notice to Employees.”

Accordingly, since Petitioner’s failure to act prevented Respondent from complying with Section 2(g) of the Order, it must be deemed waived. It would be the height of prejudice to enforce this Section against Respondent, more than twenty (20) weeks after the Order was issued, solely because Petitioner refused to take action. Respondent has already been caused to expend additional time and resources in response to Petitioner’s baseless application for enforcement. This delay is caused by the Petitioner only to frustrate and obstruct Respondent’s compliance as a means to cause economic harm. Respondent actively sought Petitioner’s participation, yet Petitioner sought legal action instead.



**h) Respondent's Compliance with Section 2(h) of the Order**

Under Section 2(h) of the June 20, 2017 Order, upon request of the Union, Respondent was required to furnish a list of the names, addresses and classification of all employees as of the latest available payroll date. The Union never made such a request. (Exhibit "J"). Therefore, Respondent must be found in complete compliance with Section 2(h) of the Order.

**i) Respondent's Compliance with Section 2(i) of the Order**

Respondent satisfied its obligation arising under Section 2(i) of the June 20, 2017 Order. Even though Respondent cannot be compelled to provide backpay under this Order, it has taken all reasonable and necessary steps to preserve the limited documentation required to determine the amount of backpay due under the terms of the Order. (Exhibit "J"). Therefore, Respondent is compliant with Section 2(i) of the Order.

**j) Respondent's Compliance with Section 2(j) of the Order**

On July 3, 2017, within fourteen (14) days of the June 20, 2017 Order, Respondent posted a signed copy of the "Appendix" on the community bulletin board located at its Bethpage facility. (Exhibit "J" & "G"). The "Appendix" was posted for sixty (60) consecutive days. The "Appendix" was never altered, defaced, or covered by any other material. Thus, Respondent has complied with Section 2(j) of the Order.

**k) Respondent's Compliance with Section 2(k) of the Order**

Under Section 2(k) of the June 20, 2017 Order, was required within twenty-one (21) days, to file with Drew-King a sworn certification of its compliance on a form provided by the Region. The Region failed to provide Respondent with a copy of a compliance form. Nonetheless, on July 10, 2017, Tony Bindra issued a sworn affidavit in which he attests to the steps taken by Respondent to ensure compliance with the June 20, 2017 Order. (Exhibit "J"). Bindra's Affidavit was served upon Drew-King on July 10, 2017.

## **VII. CONCLUSION**

For all the foregoing reasons, Respondent respectfully requests this Court deny Petitioner's application for enforcement as it seeks only to enforce action already undertaken by Respondent. Additionally, Respondent requests that this Court enter an Order invalidating Sections 2(a), 2(b), and 2(c) of the June 20, 2017 Decision and Order of the NLRB.

Dated: Bohemia, New York  
March 8, 2018

ZABELL & ASSOCIATES, P.C.  
*Counsel for Respondent*

By: \_\_\_\_\_

Saul D. Zabell  
One Corporate Drive, Suite 103  
Bohemia, NY 11716  
(631) 589-7242  
(631) 563-7475  
[szabell@laborlawsny.com](mailto:szabell@laborlawsny.com)

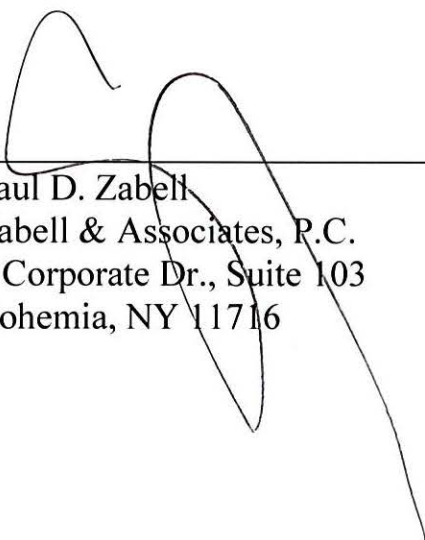


**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
v.	)	No. 17-2250
	)	
DEEP DISTRIBUTORS OF GREATER N.Y.,	)	
INC. d/b/a THE IMPERIAL SALES, INC.	)	
	)	
Respondent	)	
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), Respondent certifies that its brief contains 6,826 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2013.



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Saul D. Zabel  
Zabel & Associates, P.C.  
1 Corporate Dr., Suite 103  
Bohemia, NY 11716

Dated: March 8, 2018  
Bohemia, NY

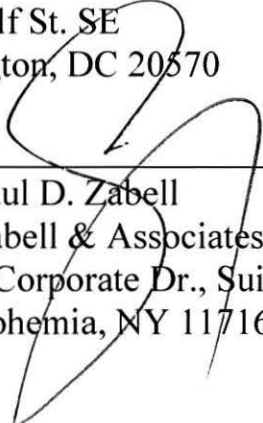
**UNITED STATES COURT OF APPEALS  
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	)	
DEEP DISTRIBUTORS OF GREATER N.Y.,	)	
INC. d/b/a THE IMPERIAL SALES, INC.	)	
	)	
Respondent	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on March 8, 2018, I electronically filed the foregoing document with Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Linda Dreeben, Esq.,  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half St. SE  
Washington, DC 20570

  
\_\_\_\_\_  
Saul D. Zabell  
Zabell & Associates, P.C.  
1 Corporate Dr., Suite 103  
Bohemia, NY 11716

Dated: March 8, 2018